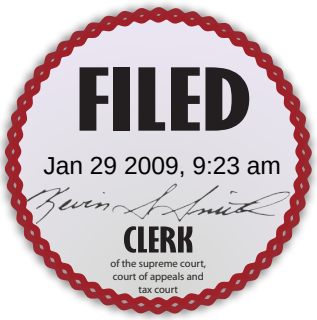

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IN THE
COURT OF APPEALS OF INDIANA

JAMES R. WORTHINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0804-CR-389
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause Nos. 35C01-0606FC-30 and 35C01-0606-FC-36

January 29, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James R. Worthington appeals from his five convictions for Burglary, each as a Class C felony, following a jury trial. Worthington raises three issues for our review, which we consolidate and restate as the following two issues[1]:

1. Whether the trial court committed reversible error when it permitted the jury to review written stipulations between Worthington and the State that were read into the record but not physically entered into evidence.

2. Whether the State presented sufficient evidence to support two of Worthington's five burglary convictions.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 9, 2006, Richard Herring, a maintenance worker at the Stor-A-Way storage facility in Huntington, saw Worthington and James Griffith standing outside unit #353, which was supposed to be vacant. Worthington and Griffith were near a gray vehicle. Herring noticed that the door to that unit had been opened, and as Herring passed by, Worthington and Griffith stopped and stared at him until he drove away. Later that day, Herring again saw Worthington and Griffith at the storage facility, this time outside of unit #468. Herring also noticed that the door to that unit had been opened even though it was supposed to be locked shut. Concerned, Herring called the facility manager and then the police.

Sergeant Donald Wall of the Huntington Police Department arrived shortly after Herring's call, but Worthington and Griffith had gone. Herring told Sergeant Wall what

[1] Worthington acknowledges that his third issue is predicated on our reversing his conviction for burglary of Stor-A-Way unit #353. See Appellant's Brief at 14-15. As discussed below, we affirm that conviction. Accordingly, we do not reach his third issue.

he had seen. Sergeant Wall went to unit #468 and saw that it no longer had a lock. He then went to unit #353. Inside, he noticed "quite a bit of Star Wars memorabilia," "a box containing an ATV snowblade, . . . a duffle bag with . . . papers in it[,] . . . hand guns[,] . . . and . . . a camera." Transcript at 250-51. The paperwork "contained . . . immigration . . . and naturalization paperwork and also titles to vehicles . . . ." Id. at 251.

At that time, Herring informed Sergeant Wall that Worthington and Griffith had returned in the gray vehicle. Sergeant Wall then drove to unit #390, where he found Worthington and Griffith "fidgeting with the lock." Id. at 254. Sergeant Wall told Worthington and Griffith to "go ahead and open the lock, don't let me bother you." Id. at 255. Griffith told Sergeant Wall that unit #390 belonged to his father and he had simply forgotten the key to the unit. Sergeant Wall detained the two men and obtained a search warrant for units 353, 354, 390, and 468, as well as the gray vehicle.

In executing the search warrant, the police found the following. In unit #353, the police discovered "[a] green Christmas money envelope containing four one dollar silver certificates, four twenty-five dollar and one fifty dollar series 'E' United States bond[s] issued to Miss Blythe Ann Whinery and one book of First National Bank in Wabash starter checks" issued to Whinery. Id. at 315. When police contacted Whinery about those items, she stated that they were in a storage facility in Wabash before they were taken. Unit #354 was rented out to Worthington, and although a search of that unit "yielded nothing of interest," Appellee's Brief at 5, the storage complex is gated and the pass code to get through the gate is only given out to renters of units within the complex. Unit #390 had been rented out to Griffith's father and a search of that unit revealed "a

real nice" power washer and a tree trimmer. Id. at 262. Nothing appeared to be missing from unit #468. Finally, in the trunk of the vehicle, the following items were found: several locks that had been cut with bolt-cutters; a basketball; a bench grinder; an electronic scale in a blue box; and a pair of cables. Under the front passenger seat, where Worthington had been sitting, another cut-open lock was found.

While being detained, Worthington informed officers that he and Griffith had gone to the Mini Warehouse, another storage complex not far from the Stor-A-Way. At the request of the police, Tom Carey, manager of the Mini Warehouse, inspected the storage units at that complex. That inspection revealed that a basketball had been stolen on June 9 from unit #10, which was rented by the Salvation Army. An electronic scale, cables, and a bench grinder had also been stolen on June 9 from unit #8, which was rented by Dome Petroleum. Also that day, James Young, who rented another unit at the Mini Warehouse, reported a stolen power washer and tree trimmer.

On June 26, 2006, the State charged Worthington in cause number 35C01-0606-FC-30 ("Cause No. 30") with two counts of burglary, each as a Class C felony. Count I encompassed unit #8 of the Mini Warehouse, and Count II covered unit #10. On August 1, the State charged Worthington with three additional Class C felony burglary counts in cause number 35C01-0608-FC-36 ("Cause No. 36"). Under that cause number, Count I alleged Worthington entered the home of Thomas Donnelly, Count II alleged he entered unit #468 at the Stor-A-Way, and Count III alleged he unlawfully broke and entered into Stor-A-Way unit #353 with the intent to retain stolen property therein. The two causes were consolidated and the trial court held a jury trial on February 12 and 15, 2008.

Griffith testified at Worthington's jury trial. In relevant part, he stated as follows:

Q Okay. Where had that green duffle bag come from?

A Warren.

Q Okay. And how did it come from Warren if you know?

A Out of a storage unit.

Q And were you present when it was taken out of that storage unit?

A Yeah.

Q Okay. Who else was there with you during that?

A James.

Q Okay. And that would be the defendant, Mr. Worthington, correct?

A Yeah.

* * *

Q Okay. What'd you do with the stuff that you took out of the unit there at Warren? Where did it go to?

A First it went to my dad's trailer.

Q Okay and uh, after that where did it go from your dad's trailer?

A To James' storage shed.

Q Okay. The one you're calling James' storage shed, what unit did you think was James' storage shed?

A 353.

* * *

Q Okay. Did you, what were you doing when you were going there the times before June 9th, what were you doing there when you were going to the unit?

A Move some stuff there.

* * *

Q Okay. Now on June 9th did you break in to some other units that day?

A Yeah.

Q The day you were at 353? Okay. Where was the unit, the first unit located that you went to after you left unit 353 that day?

A Uh, it was on the back side of the same . . . .

Q Okay. And that particular unit did you guys have permission to be in that unit on the back side?

A No.

Q Okay. When, you, how'd you gain entry into that unit on the back side?

A Cut the lock.

Q Okay.

A I believe it was 468.

* * *

Q Okay. So after . . . you cut the lock there, uh, what did you do once the door was up on 468?

A Looked inside.

Q Just you or both of you or one of you or who?

A Both of us.

Q Okay. Did you guys find anything in there?

A No.

Q Did you take anything from there?

A No.

Q If you had found something that you guys wanted would you have removed it that day?

A Yeah.

Id. at 422-26.

Throughout Worthington's trial, stipulations that he had entered into with the State were read to the jury. In particular, the parties stipulated to the following facts:

> The following facts and/or events are admitted as true by both parties for use at trial:
>
> 1. The Defense stipulates that on June 9, 2006, Unit #8 of the Huntington Mini Warehouse, located in Huntington County, Indiana, was rented by Dome Petroleum of Pierceton, Indiana. Furthermore, the defense stipulates that on June 9, 2006, neither Dome Petroleum, nor any of it's [sic] employees, gave permission for anyone to enter Unit #8 of the Huntington Mini Warehouse, nor was permission given for anyone to take any of the belongings located within the unit.
>
> Furthermore, the defense also stipulates to the admissibility of property, and/or photographs of property, recovered on June 9, 2006, belonging to Dome Petroleum. Finally, the defense will stipulate that this recovered property was missing from unit #8 and later identified by representatives of Dome Petroleum as property taken without any lawful authority from unit #8.
>
> 2. The Defense stipulates that on June 9, 2006, Unit #10 of the Huntington Mini Warehouse, located in Huntington County, Indiana, was rented by The Salvation Army of Huntington, Indiana. Furthermore, the defense stipulates that on June 9, 2006, neither the Salvation [A]rmy, nor any of it's [sic] employees, gave permission for anyone to enter Unit #10 of the Huntington Mini Warehouse, nor was permission given to anyone to take any of the belongings located within the unit.
>
> Furthermore, the defense also stipulates to the admissibility of property, and/or photographs of property, recovered on June 9, 2006, belonging to the Salvation Army. Finally, the defense will stipulate that this recovered property was missing from unit #10 and later

identified by representatives of the Salvation Army as property taken without any lawful authority from unit #10.

3. The Defense stipulates that on or about May 25, 2006, Steve Donnelly was the renter of a storage unit located at the Country Closet Storage facility in Huntington County, Indiana[.] Furthermore, the defense stipulates that on or about May 25, 2006, neither Steve Donnelly, nor any of his family members, gave permission for anyone to enter his storage unit at the Country Closet Storage facility, nor was permission given for anyone to take any of the belongings located within the unit.

Furthermore, the defense also stipulates to the admissibility of property, and/or photographs of property, recovered on June 9, 2006, from unit 353 of the Stor-[A]-[W]ay Storage Facility. The defense will stipulate that this property was later identified by members of the Donnelly family as property belonging to Steve Donnelly and taken without lawful authority from his storage unit at the Country Closet Storage facility on or about May 25, 2006.

4. The Defense stipulates that on June 9, 2006, Unit #468 of the Stor-[A]-[W]ay Storage Units, located in Huntington County, Indiana, was rented by Gene and Donna Lahr of Huntington, Indiana. Furthermore, the defense stipulates that on June 9, 2006, neither Gene nor Donna Lahr gave permission for anyone to enter Unit #468 of the Stor-[A]-[W]ay Storage Units.

Appellant's App. at 122-23. At the end of the trial, the State requested the written stipulations be submitted to the jury. Worthington's trial counsel objected on the grounds that doing so would "emphasize[] a particular portion of the evidence . . . without being able to send back a transcript of the entire trial." Transcript at 704. Noting that the "[s]tipulations had been read into the record," the court overruled Worthington's objection and permitted the written stipulations to be submitted to the jury during deliberations. Id. at 703-05.

After deliberations, the jury found Worthington guilty as charged in Cause No. 30 and guilty of counts II and III in Cause No. 36. The court entered its judgment of

conviction accordingly. The court then ordered Worthington to serve an aggregate term of six years with three years suspended. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Written Stipulations

Worthington first contends that the trial court erred by permitting the jury to review the written version of his stipulations during deliberations even though that document was not admitted into evidence. Specifically, Worthington asserts that the written document containing the stipulations was not admitted into evidence but was instead extrinsic material, and, as such, the State bears the burden of establishing that the jury's review of that extrinsic material was harmless to the defendant. See Taylor v. State, 681 N.E.2d 1105, 1110 (Ind. 1997). But while the written document was not admitted into evidence, neither were the contents of that document extrinsic. Rather, the stipulations had been read verbatim to the jury during trial. As such, the stipulations were not outside information but were instead a part of the record.[2] See Grigsby v. State, 267 Ind. 465, 468, 371 N.E.2d 384, 386 (1978) ("[T]he Court has refused to hold that jury contact with outside information is always cause for overthrowing a verdict . . . ." (emphasis added)).

In Ascherman v. State, 580 N.E.2d 294, 296-98 (Ind. Ct. App. 1991), trans. denied, this court reviewed Indiana's case law on the submission of material to a jury during deliberations. We held: "To summarize, when reviewing alleged error in the

[2] We note that, if Worthington's position that the written document was extrinsic were accepted as true, then Worthington would have been required to request a mistrial from the trial court. See, e.g., Taylor, 681 N.E.2d at 1110; Ascherman v. State, 580 N.E.2d 294, 296 (Ind. Ct. App. 1991), trans. denied. Worthington did not do so.

submission of confessions or written reports to a jury during deliberations, our supreme court has evaluated the circumstances surrounding the submission and the potential for prejudice to the defendant." Id. at 297. Where the evidence in a case is "not highly conflicting," or where the material submitted to the jury does not "create[] harmful conflicts in the evidence" or otherwise prejudice the defendant, we will not find reversible error. See id.

Here, Worthington rightfully concedes that "he agreed to the stipulations and thus would be hard-pressed to argue prejudice as to the content of the stipulations themselves." Appellant's Brief at 9. Nonetheless, Worthington asserts that giving that document to the jury was error because "a written stipulation in the jury room . . . is subject to improper use . . . because it implies that the jury is not the ultimate finder of fact . . . ." Id. We cannot agree with Worthington that the trial court committed reversible error on this issue.

Given the evidence presented at Worthington's trial and the contents of the written document, the submission of that document to the jury did not create a harmful conflict in the evidence. In his closing argument to the jury, Worthington's trial counsel summarized the grounds on which he was requesting Worthington's acquittal:

> [The State has] to prove this case beyond a reasonable doubt. And I'm going to leave you . . . with just three things I want you to remember when Mr. Groves [for the State] comes back up here. First is, 1949, 1947, 1979. The codes. That fits with what James told you. He had me rent that unit and he gave me his birth year to use. Where's the pressure washer? Second thing to keep in mind. Where's it at, where's the tree trimmer, and how did it get there? And the third is why, why in heaven's name, when you've got two different versions don't you bring in evidence to show either Mr. Griffith is telling the truth and we find fingerprints on a lot of

> stuff . . . , or we don't find fingerprints. They should have done more if they want to tell you that this is proof beyond a reasonable doubt . . . .

Transcript at 675-76. Nothing in Worthington's stipulations conflicted with any point of his defense or otherwise created a conflict harmful to him. As such, the trial court did not abuse its discretion in submitting the written document to the jury.

Issue Two: Sufficient Evidence

Standard of Review

Worthington next argues that the State did not present sufficient evidence to support either of his convictions in Cause No. 36. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. To prove that Worthington committed burglary, as a Class C felony, the State was required to demonstrate beyond a reasonable doubt that he broke and entered into the building or structure of another person with the intent to commit a felony in it. See Ind. Code § 35-43-2-1 (2004).

Unit #468

Worthington first argues that the State failed to demonstrate that he intended to commit a felony, namely, theft, inside Stor-A-Way unit #468. "Intent may not be inferred from the mere proof of breaking and entering alone." Desloover v. State, 734

N.E.2d 633, 634 (Ind. Ct. App. 2000), trans. denied. Rather, "some fact in evidence must point to an intent to commit a specific felony." Id.

On the issue of Worthington's intent to commit theft within unit #468, the State presented the testimony of Griffith. Griffith stated as follows:

> Q Okay. So after . . . you cut the lock there, uh, what did you do once the door was up on 468?
>
> A Looked inside.
>
> Q Just you or both of you or one of you or who?
>
> A Both of us.
>
> Q Okay. Did you guys find anything in there?
>
> A No.
>
> Q Did you take anything from there?
>
> A No.
>
> Q If you had found something that you guys wanted would you have removed it that day?
>
> A Yeah.

Transcript at 425-26 (emphasis added). On appeal, Worthington parses that testimony to suggest that the statement "you [would] have removed it that day" used the singular "you," therefore meaning Griffith, rather than the plural "you" denoting both Griffith and James. But the State correctly responds that "[t]he jury was not obliged to parse this statement according to Worthington's argument on appeal." Worthington's argument is a request for this court to reweigh the evidence, which we will not do. The State presented

sufficient evidence to demonstrate that Worthington intended to commit theft within unit #468.

Unit #353

Finally, Worthington contends that the State failed to prove that he intended to retain stolen property within Stor-A-Way unit #353. On this issue, Worthington argues that this conviction must be reversed because: (1) insofar as he has been convicted of theft and receiving stolen property over the same property, double convictions violate Indiana's single larceny rule[3]; and (2) the State did not prove that, on June 9, 2006, he "intended to begin the exercise of unauthorized control of the property." Appellant's Brief at 13. Both of Worthington's arguments are without merit.

On June 9, 2006, the State executed a search warrant for unit #353 after Griffith and Worthington had cut the lock to access that unit. Inside, the police discovered "[a] green Christmas money envelope containing four one dollar silver certificates, four twenty-five dollar and one fifty dollar series 'E' United States bond[s] issued to Miss Blythe Ann Whinery and one book of First National Bank in Wabash starter checks" issued to Whinery. Transcript at 315. And at his trial, the State used the evidence of Whinery's stolen property against Worthington only on the issue of the stolen property being retained inside unit #353. As such, Worthington's conviction on this count does

[3] The "single larceny rule" provides:

> When several articles of property are taken from the same person at the same time, from the same place, there is but a single larceny for which there may be but one judgment and one sentence. This rationale extends to theft as an included offense; where both cash and an automobile were taken during an armed robbery, the State could not split up a single offense to make distinct parts the basis for multiple prosecutions.

Johnson v. State, 749 N.E.2d 1103, 1110 (Ind. 2001) (quoting Tingle v. State, 632 N.E.2d 345, 350 (Ind. 1994)).

not impose on him "two charges for [a] single act." Appellant's Brief at 13. Nor is there a legitimate question regarding the date of the offense.

Conclusion

In sum, we hold that the trial court did not commit reversible error by submitting Worthington's written stipulations to the jury during deliberations. We also hold that the State presented sufficient evidence to support Worthington's convictions under counts II and III of Cause No. 36. Thus, we affirm Worthington's convictions.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.